THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 2401-0194-10
NATASHA CARRERA-MASON,	)	
Employee	)	
	)	Date of Issuance: April 27, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge

Natasha Carrera-Mason, Employee *Pro-Se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Natasha Carrera-Mason ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of terminating her employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time her position was abolished was ET-15 Early Education Teacher at Patterson Elementary School ("Patterson"). Employee was serving in Educational Service status at the time she was terminated.

I was assigned this matter on February 8, 2012. On February 16, 2012, I ordered the parties to submit written briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Both parties have submitted their respective responses to the order. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. School Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools[1].

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02[2], which encompasses more extensive procedures, for the reasons explained below, I find that D.C.

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[1] *See Agency's Answer*, Tab 1 (January 7, 2010).

[2] D.C. Code § 1-624.02 states in relevant part that:

> (a) Reduction-in-force procedures shall apply to the Career and Educational Services… and shall include:
> (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
> (2) One round of lateral competition limited to positions within the employee's competitive level;
> (3) Priority reemployment consideration for employees separated;
> (4) Consideration of job sharing and reduced hours; and
> (5) Employee appeal rights.

Official Code § 1-624.08 ("Abolishment Act or the Act") is the more applicable statute to govern this RIF.

Section § 1-624.08 states in pertinent part that:

> (a) ***Notwithstanding*** *any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect* for the fiscal year ending September 30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).
>
> (b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.
>
> (c) ***Notwithstanding*** *any rights or procedures established by any other provision of this subchapter*, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).
>
> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that "the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency."[3] The Court also found that both laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[4]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*[5], the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure

[3] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[6] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[7] The Court stated that the "ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF."[8]

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.[9] The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter," which indicates that it supersedes any other RIF regulations. The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[10] Further, "it is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[11]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[12] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision in order to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, I find that an employee whose position was terminated may only contest before this Office:

1. That he/she did not receive written notice thirty (30) days prior to the effective date of their separation from service; and/or

2. That he/she was not afforded one round of lateral competition within their competitive level.

Employee's Position

Employee submits that the instant RIF was done in order to remove her from service at Patterson. Employee alleges that she had an unproductive relationship with Principal Lee of Patterson, who she alleges repeatedly threatened to remove her from service on numerous occasions.[13] Moreover, Employee contends the following:

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[6] *Id.* at 1132.
[7] *Id.*
[8] *Id.*
[9] *Id*.
[10] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[11] *Id.*
[12] *Mezile v. D.C. Department of Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[13] Natasha Carrera-Mason's Brief – Amended Version 3.30.2012 at 1 – 2.

- Principal Lee failed to incorporate suggestions that she provided in order to improve working conditions.

- Principal Lee created phantom positions that were then eliminated as part of the RIF. There is no direct indication that Employee encumbered one of these positions when her position was abolished.

- Employee claims that there were more than five Early Education teachers stationed at Patterson. Employee failed to provide any sort of corroborating evidence to buttress this contention.

- Employee takes umbrage with the CLDF form utilized in this matter. She deems it inaccurate. Moreover, Employee feels that she "exude[s] warmth and friendliness particularly due to [her] Caribbean heritage."[14]

- Employee contends that she was unable to receive an adequate evaluation because she was on leave at the time of the evaluation because she had suffered an accident. Supposedly, Principal Lee did not have enough interaction with Employee in order to properly assess her through the CLDF.

- Employee believes that the budgetary concern that gave rise to the instant RIF was a sham.

- Employee contends that she did not receive her RIF notice on October 2, 2009, but rather it was sent via FEDEX and she received said documents on October 5, 2009. Employee admitted that Principal Lee called her at home on October 2, 2009, in order to inform her that her position was being abolished through the RIF.

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code. Employee was given thirty (30) days written notice prior to the effective date of her termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the second lowest ranked position, Employee herein, was terminated as a result of the one round of lateral competition.

Analysis

Under Title 5 DCMR § 1501.1, the Chancellor of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based "upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education,

[14] *Id.*

including discrete organizational levels such as an individual school or office." For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

> 1. The pay plan and pay grade for each employee;
>
> 2. The job title for each employee; and
>
> 3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.[15]

Here, Patterson was identified as a competitive area, and ET-15 Early Education Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were five ET-15 Early Education Teachers stationed at Patterson. Only three of those positions survived the instant RIF.

Employee was not the only ET-15 Early Education Teacher within her competitive level and was, therefore, required to compete with other similarly situated employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performance;
>
> (b) Relevant supplemental professional experiences as demonstrated on the job;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
>
> (d) Length of service.

[15] District of Columbia Public Schools' Brief at 2-3 (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

> (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
>
> (b) Significant relevant contributions, accomplishments, or performance – (10%)
>
> (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
>
> (d) Length of service – (5%)[16]

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.[17] Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given "broad authority to issue regulations governing the release of employees under a RIF…including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority." I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form ("CLDF") in cases where employees subject to a RIF must compete against each other in a lateral competition. In conducting the instant RIF, the principal of Patterson was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the "length of service" category was completed by the Department of Human Resources ("DHR").

Employee received a total of 3.5 points on her CLDF. The next lowest person with whom Employee competed against received a total score of 72. Employee was the second lowest ranked person in her competitive area and level. Employee's CLDF stated, in pertinent part, the following:

> Ms. Mason has difficulty displaying and fostering positive interactions and collegial relationships. In addition, she has been unpleasant and

[16] It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).
[17] Agency Brief at 5 (March 8, 2012).

> uncooperative with her co-teacher, which has impeded the ability of the co-teacher to plan collaboratively and rendered the classroom milieu unwelcoming for students and colleagues… She has a very negative impact upon the school and fails to contribute positively to the needs of the school.

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of zero (0) points out of a possible ten (10) points in this category; a score much lower than the other employees within her competitive level. Employee argues that the documentary evidence does not support the score afforded to her. Again, the principal of Patterson was given the discretion to complete Employee's CLDF. Employee has provided little credible evidence that may bolster her score in this area. Moreover, I find that the Principal at Patterson had wide latitude to invoke his managerial discretion with respect to assessing the on-the-job performance and capabilities of his subordinates. With respect to Office and School needs, I find that in this matter I will not substitute my judgment for that of the Principal of Patterson as it relates to the score he accorded to Employee and her colleagues in the instant matter.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. Employee received zero (0) points in this area and contends that the CLDF did not account for her significant contributions including coordinating several field trips for the Early Childhood Education Team. I find that this falls within the rubric of managerial discretion. Considering as much, I further find that Employee's arguments to the contrary are unconvincing.

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee used similar argument as noted in the preceding sections in order to substantiate her contention that she should have been awarded additional points on his CLDF. I find that this falls within the rubric of managerial discretion. Considering as much, I again find that Employee's arguments to the contrary are unconvincing.

Length of service

This category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an "outstanding" or "exceeds expectations" evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

An outstanding performance rating in the previous year gets employee an extra four (4) points in the length of service category. I find that Employee has not provided any credible

supporting documentary evidence to support any additional points being awarded in this category. Employee received a total of 3.5 points in this category. She contests the points awarded because other colleagues who had a shorter tenure with DCPS were retained at Patterson while she was released.

According to Employee, an evidentiary hearing is needed to validate the truthfulness of the principal's statements contained within her CLDF. Employee also contends that a review of her school related accomplishment and activities would prove that the CLDF scores are in direct conflict with her previous work performance throughout her tenure with DCPS.

In reviewing the documents of record, Employee does not proffer any credible statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."[18] According to the CLDF, Employee received a total score of 3.5 after all of the factors outlined above were tallied and scored. The next lowest colleague received a total score of 72. Employee has not proffered any credible evidence to suggest that a re-evaluation of her CLDF scores would result in a different outcome in this matter.[19]

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[20] This Office will not substitute its judgment for that of an agency when determining whether a penalty imposed against an employee should be sustained. Rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[21] A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[22]

Accordingly, I find that the Principal of Patterson had discretion in completing Employee's CLDF. I further find that the Principal of Patterson was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "…interpretations of

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[18] *See also American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

[19] See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law).

[20] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[21] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

[22] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985).

their worth against [the] principals' evaluations."[23] While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. Therefore, I find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Lack of Budget Crisis

In *Anjuwan v. D.C. Department of Public Works,*[24] the D.C. Court of Appeals held that OEA lacked the authority to determine whether an Agency's RIF was bona fide. The Court explained that, as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF.[25] The Court in *Anjuwan* also noted that OEA does not have the "authority to second-guess the mayor's decision about the shortage of funds…about which positions should be abolished in implementing the RIF."

OEA has interpreted the ruling in *Anjuwan* to include that this Office has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee claim regarding how an agency elects to use its monetary resources for personnel services. In this case, how Agency elected to spend its funds for personnel services. Likewise, how Agency elected to reorganize internally, was a management decision, over which neither OEA nor this AJ have any control.[26]

Thirty (30) Days Written Notice

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF. (Emphasis added).

The RIF Notice is dated October 2, 2009. However, Employee alleges that she received her RIF Notice on October 5, 2009. The RIF effective date was November 2, 2009. Employee did not provide any corroborating evidence in order to buttress her allegation. Employee submitted several exhibits in order to prosecute her appeal. Yet she did not include the address label from FEDEX which would tend to verify her claim. I also take into consideration that Employee admitted that she was on leave at the time the RIF Notice was sent, that she was verbally informed on October 2, 2009, by Principal Lee that the RIF Notice was being sent to her and that, according to her, she received the RIF Notice a couple of days later. The RIF Notice states that Employee's position is being abolished as a result of a RIF. The RIF Notice also

[23] *Washington Teachers' Union* at 780.
[24] 729 A.2d 883 (D.C. 1998).
[25] *See Waksman v. Department of Commerce*, 37 M.S.P.R. 640 (1988).
[26] *Gaston v. DCPS*, OEA Matter No. 2401-0166-09 (June 23, 2010).

provides Employee with information about her appeal rights. Therefore, I find that Employee was given the required thirty (30) days notice prior to the effective date of the RIF.

Conclusion

It is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals[27]. Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that the OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I find that Employee's position was abolished after she properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. Therefore, I conclude that Agency's action of abolishing Employee's position was done so in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[27] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.